# LOOKING FORWARD

LAWYERS have always held a higher place in their own esteem than in the regard of the general public. One recalls the mediaeval proverb: *Nullus causidicus nisi mendax.* The same feeling is not seldom exhibited in modern times, as in the will of an English admiral (if my memory is correct) made public some years ago, in which the testator took occasion to put on record the ill conceit which he had of the legal profession. It is not part of my present business to say if, and how far, this reproach is deserved. I prefer to consider a more agreeable theme, namely, the part which lawyers may play in promoting international harmony and in making the world a better place to live in. The subject is closely connected with the topic of legal education, *i. e.*, the best means of training our lawyers to realize the destiny which, if they are worthy of it, the future may hold in store for them.

Among the influences which tend to promote union or disunion between nations, language, religion, government and law all play their part. We may leave it to the political philosopher who like Machiavelli or Montesquieu occupies himself with the causes of the rise and fall of states to explain how these several forces act and react upon one another through the ages, here combining, there disintegrating, always restlessly at work. He would perhaps tell us that difference of law is closely parallel to difference of language. Just as we see communities speaking the same language, but owing allegiance to different sovereignties, or again one sovereignty exercised over communities speaking diverse tongues, so law sometimes transcends, sometimes stops short of, the limits of governmental authority. But language and law seem on the whole to exhibit opposite tendencies. If community of language has been in the modern, even more than in the ancient, world a powerful factor in developing a sense of common nationality, on the other hand difference of language is a strong motive of disintegration. But law exercises a more steady pressure towards union and away from disunion. Differences of law more readily than differences of language yield to the forces which make for unity.

Today we are feeling our way towards the larger unities which, passing beyond the limits of national life, will bring the nations into a harmony of sentiment and of interest heretofore unknown. What part can law and lawyers play in this wished-for consummation? The history of the legal systems of the world during the last century and a half may help us to an answer.

Let us carry our minds back to the time when Blackstone was writing his Commentaries and teaching Jurisprudence "to speak the language of the scholar and the gentleman." A glance at the legal map of Europe as it was then will afford an indication of the progress that has been made since that time towards unity of law. I am speaking of the pre-codification era, in which over a great part of Europe the law varied from province to province and almost from parish to parish. The kingdom of France was divided into the "countries of the written law" in which Roman Law was administered, diversely modified, however, by local customs, and the countries of the customary law, in most of which the Roman Law was appealed to *in subsidium*. In Germany and in Holland it had been "received" as a general common law, but local customs and the intrusive elements of feudal and canonical law produced endless complexity. Things were much the same in the other countries of the continent of Europe. The one harmonizing influence in so much diversity was the tradition of the Roman Law which gave to these multitudinous systems their vocabulary and very much of their substance. It made them at least intelligible to one another. The English law, meanwhile, like the strange islanders who followed it, was *penitus semota* — a thing apart; and it had conveyed its individual quality to such of the "distant plantations in America" as were occupied and peopled from the mother country.[1]

Napoleon's Civil Code promulgated in the year 1804 was not the first in date of modern codes, but it marked the beginning of a new era. The common legal tradition of the Latin races found in it expression in a form which with some modifications was easily adaptable to the needs of all of them. It was as if nations which had for centuries spoken dialects of an original tongue had arrived by consent at a common language. It would take too long to tell how the Code Napoléon set the standard of codification during the

[1] 1 Bl. Comm 106.

nineteenth century. Some codes followed it, others reacted from it, but all betrayed its influence. Today it is in force, fundamentally unaltered, in France and the French Colonies, in Belgium, and in the British Colonies of Mauritius and Seychelles. Codes more or less obviously derived from it have authority in Holland, Spain, Rumania, Egypt, Quebec, and Louisiana, as well as in Latin Central and Southern America.[2]

For the men of the beginning of the last century, who had grown up in an atmosphere of legal parochialism, infected with the misty exhalations of the dark ages, the promulgation of the Code Napoléon was as the rising of the sun. The diffusion of this Code over a great part of the world was the time of its meridian splendour. The end of the century saw its influence decline. The code for the German Empire marks a new departure, not merely on account of its conscious germanism, but, more important, as an attempt to base an ordered statement of the law of a country upon a reasoned foundation. The work of the commissioners who drafted the Code Napoléon was to codify the law of France. In doing so they had to supersede the multiplicity of existing systems by the simplicity of one harmonious whole. Their task was a task of selection. Here they followed the Roman Law, there they consecrated a custom, now, may be, the Custom of Paris, anon the Custom of Orléans. But they were still expositors, not censors, of the old laws. Out of many French laws they made a law for France which, in the event, proved fit to be the law of other nations as well. Their task was completed within four years. The German Code was on the anvil for twenty years.[3] The finished result of so much Teutonic labour has been pronounced superior to the French Code, whether the criterion be accuracy of expression, completeness of exposition, or the intellectual effort which went to its making. If it had been in all these qualities inferior to what it is, its influence would still have been profound from the mere fact of its existence. From the moment of its birth the supremacy of the French Code was challenged. The Civil Code of Japan came into effect in 1898. It is significant

[2] Much interesting information with regard to the Code Civil and its influence during the nineteenth century is to be found in the LIVRE DU CENTENAIRE, Paris, Arthur Rousseau, 1904. The Code de Commerce, which took effect on Jan. 1, 1808, was an altogether inferior production.

[3] See "The Making of the German Civil Code" in 3 MAITLAND, COLLECTED PAPERS.

that it is very largely based upon the German Code,[4] while the earlier project of 1890, the work of a Frenchman, M. Boissonade, had been mainly based upon the French.[5] Henceforward, given intelligent compilers, each new national code will be better than the codes which have gone before. The latest example is the Civil Code of Switzerland, which took effect from 1st January, 1912. Others will follow. Codification has entered upon an era in which it endeavours to express not the laws of a country, but the best laws for a country. Once the two phrases might have been judged identical, but that is so no longer. More and more, as time goes on, the fundamental conditions of human life, for the ordering of which laws are framed, are becoming closely similar the world over. The world is narrowing. In moral standards, in social customs, in ideas, in dress, the nations are drawing together. More and more they are acting and reacting upon one another. It is obvious that law will not resist the general impulse.

Whether, then, we consider the course of legal history during the last century or estimate the social and economic forces of our time, we are conscious of law as of something which goes beyond the limits of nationality, as an influence tending to bring men into closer relation with one another. Now we must be blind indeed to what is going on about us if we do not see that it is upon such forces as these that the future of the world depends. Not nationalism alone will realize the Kingdom of God upon earth, or, what comes to the same thing, the rule of right and reason. The "super-man" has not proved a success, nor the "super-nation." What we are feeling after is "super-nationalism." This end we may promote by stimulating the forces which run athwart the strata of nationality. Foremost amongst these is Law, not the law of the parish or of the province, not even of the nation, but the law of our common humanity.

It may be objected that the idea of a "law of nations" is no new one; that it left its impress upon Roman Law: that it was a philosophical commonplace for some two thousand years; that it is no

[4] The German Code was promulgated Aug. 24, 1896, though it did not take effect until Jan. 1, 1900.

[5] The actual Code is by no means exclusively German in origin. Mr. Gorai in the LIVRE DU CENTENAIRE writes: "Bien que ce nouveau Code se soit inspiré, dans son plan général, du Code allemand, il se compose d'emprunts au Code français pour une moitié environ de ses dispositions."

longer in vogue. All this may be true. But what if the thing is with us, though the idea is not? We must dig up the old idea to meet the new state of facts. The modern *jus gentium* is not a speculative sophism. It is a vital energy. It may be consciously fostered and developed. In this field of activity, if in any, the lawyer who is not condemned by choice or circumstance to be a mere tradesman, may find his opportunity of social service. For the law school in particular there opens a new and wider horizon. It will be worth while to enquire what the law schools of this continent may do to promote the peace and well-being of the world, and what changes this may entail in the methods and range of their studies. The two questions are so intimately connected that I shall make no attempt to disentangle them. They are twin threads of a single skein. Besides this I shall have something to say on another closely allied topic — the codification of the Common Law.

We are all agreed, I suppose, that there is such a thing as legal science, and that it is the business of the law schools to teach it. I will add that the principal function of the law school is to teach law, not to teach men to be lawyers. This proposition, if admitted, involves some readjustment of methods of teaching. Perhaps we have been too apt to go for our law to the past, to regard legal study as matter of historical research. But if legal science is to play its part in reshaping the world, it must occupy itself with the future rather than with the past. It will no longer rest content to be a "chronicle of wasted time." Rather it must express "the prophetic soul of the wide world dreaming on things to come." A corresponding change must come over the law schools if they are to keep pace with the needs of the new age.

A French commentator on one of the modern codes remarks upon the surprising resemblance which these codes exhibit in some directions and the no less surprising divergence which they exhibit in others. The common element may be supposed to correspond very closely with those parts of the law which repose upon fundamental facts of human nature and human experience. With regard to this portion of the *corpus juris* the function of the law school will consist principally in finding the best form of expression for ascertained rules of law. The parts of the law which lie outside this solid nucleus are less securely grounded. They have not the same permanency. They are shaped and reshaped at the whim of the

legislature. In a word they have not emerged from the stage of experiment. Here the function of the law school will be to guide the experimenters, to direct their attention to the course of legislation in other lands. In matters of form they will fight against useless and arbitrary diversity in statutes, against the infirmity of the legislative mind which identifies change with improvement.

Thus far I have spoken of the future activities of the law school in what I will term the domestic forum. Success will attend its efforts only so far as it is able to enlist in its service the best juristic talent, and only so far as it is able to establish itself in the public confidence. To this end we must develop a state of sentiment in which the law schools will pronounce an authoritative word, if not in matters of substance (though that too may come), at least in matters of form. Our legislators must be taught to look to the law schools for guidance in all matters affecting the *technique* of legislation, as naturally as they turn to the medical profession in matters affecting the public health. The law schools, on the other hand, must take a wider view of their function and opportunity. Some of them will occupy themselves principally with research. All of them will supply courses of study designed as an introduction to various branches of public life. They will cease to be machines for turning out lawyers. They will become more than before schools of citizenship. Plato dreamed of a time when philosophers should be kings, and kings philosophers. May we not entertain a nearer vision of legislators who have been taught to legislate, and of law school graduates pledged to social service?

Let us then have in connection with our law schools bureaux of highly qualified investigators, whose business it will be to watch and direct the course of domestic legislation. This is already much, but it is only a beginning. By fostering personal relations, by exchanging ideas and perhaps students, with similar institutions in other lands, the law schools may become agents of international comity, promoters of international understanding, apostles of international peace; and all this within the field which is proper to them — the field of law. As to personal intercourse, I need not enlarge on methods which will occur to everyone. The way has been shown by interstate and inter-provincial meetings, and by such institutions as the International Law Association (not an association for the study of international law, but an international society of lawyers) which

for many years past has brought the lawyers of different countries together, and has done useful work in promoting uniformity in commercial law. The law schools, if they turned their attention to it, could further the same objects with more obvious and substantial results. We must have an International Association of Law Schools with a permanent staff. The central office will collect and disseminate information. Annual meetings will be held for the ventilation of matters of common interest. Another suggestion which I venture to make is that each law school of this continent should seek some special affiliation with one or more law faculties of the universities of Europe. An exchange of students and professors would follow. A close attachment of this sort might serve to concentrate effort and promote friendly rivalry between the associated groups.

That legal science would be advanced by the coördinated effort of the law schools of different nations will not be questioned. They have the world for their field, and they may do as much to shape the destinies of the world-law of the future as the Sabinians and the Proculians did for legal science under the early Roman Empire. I am speaking not of international law — *jus inter gentes* — which at the present moment is held in small esteem, but of that *jus gentium*, established, so the Romans taught, by natural reason amongst all peoples, which more and more extends its dominion over the commercial and the civil code. If indeed we have entered upon an era in which the contents of each system of positive law will be determined more by reason and less by tradition, will not reason in time eliminate what is unreasonable in each system, and will not community of ideas go some way towards reducing what is merely arbitrary and accidental in each system to a very considerable measure of uniformity? A universal code of commerce does not lie beyond the range of possibility. A universal civil code is perhaps not to be expected or desired, any more than a universal language. But all the indications point to a time when the legal systems of the world will come closer together in substance and even in form. To pursue the linguistic analogy — they will speak no longer a babel of voices, but various dialects of a common tongue.

I have hinted already that if the law schools of this continent are to rise to the measure of their opportunity they must to some extent change their methods. I trust that I may, without offence, revert

to this point, for it is a matter of great importance. The law schools of North America, with one or two exceptions, teach the Common Law. They teach it with marked success. But they teach nothing else. I wonder how many law school graduates have any knowlege of the Twelve Tables, or of the Praetor's Edict, or of Justinian's codification of the Roman Law. How many of them can explain the difference between *usufruct* and life estate, or between *fidei-commissum* and trust? Do they know what is meant by the "dotal system" or by "community of goods between spouses"? If they do not understand these things, in what are they fundamentally wiser or better than the students of Blackstone's day, immersed in the lore of fines and recoveries, trespass and case, contingent remainders and executory limitations? Has any one told them that the study of a single system of law, particularly of a system which is not very systematic, is an illiberal study? Do they know that to study law is not the same as to study the law of any one country? In England legal education has not reached any high point of development, but at least no young man can go through a law course at Oxford or Cambridge and carry away with him the impression that Law means the law of England, or that legal study means the study of the Common Law. On this continent the Common Law is too completely absorbed in self-contemplation, like a lady admiring her face in the glass. Let her beware lest she suffer the fate of Narcissus and "die of her own dear loveliness."

What has the Common Law done to hold its own in the world in competition with its rivals? We, who have been trained to it, boast of its perfection. We applaud its freedom from barren abstractions and niggling pedantries. But what have we done to make it intelligible or commendable to the foreigner? Has any law school on this continent undertaken a codification of the Common Law? The task would be worth attempting, if only for the sake of study and comparison. It is doubly worth attempting when the influence of the Common Law in the world — in South America for example — depends upon the manner of its presentation. If China comes to us for a code what have we to offer? She asks for bread, we give her a stone; — for a code, we produce a casebook.

In recommending codification to the earnest attention of common-lawyers I express no preference for a codified system as a system to live under. It may be that we are better off as we

are.[6] It may be that the time has not come for enacting the Common Law in the form of a Statute. But I am thinking not of enactment, but of influence. While the Common Law remains uncodified, it will have little weight in the world outside the countries (and the dependencies of the countries) in which it is at home. Another consideration to bear in mind is this. Code or no code, we cannot recommend our Common Law system to the lawyers of other nations, until we have learnt to present it to them in terms which they can understand; and to do that we must understand their law as well as our own.[7] This does not involve the mastery of a hundred different systems. It means a competent knowledge of Roman Law and of the institutions of customary origin which have combined with it to form the mixed systems of continental Europe and of Latin America. All these, diversely compounded out of the same materials, are fundamentally the same. To know one of them is to know the rest.

We are at the beginning of a new age. No one can forecast with any certainty what developments even some of us who are in middle life may live to see. There are those who think that the best hope for the world's future lies in the coöperation of the English-speaking nations to promote the ideals which they share in common. If this is our destiny, we must enlist all our forces in its service. Our law is one of the things we have in common. It is one of the best things we have. We have kept it to ourselves when we might have given it to the world. Is it too late to change our ways? Let the law schools answer. The future is in their hands.

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[6] I am speaking, of course, of the Common Law States and Provinces of the United States and Canada. In my own Province of Quebec, as in Louisiana, the Civil Law is codified.

[7] See an address on the "Unification of Law" delivered before the Liverpool Board of Legal Studies by the late Lord Justice Kennedy, 10 J. SOC. OF COMPARATIVE LEGISLATION 218:

"Now, you will agree that in order to unify law we must try to understand and appreciate that law, different from our own, which is in force in those States, whose agreement to a common code we labour to secure. There is not much use in trying to persuade a man to prefer our system to his, or to modify his own, if he sees that we do not understand what the principles and rules of his system are."

While speaking of this matter, I gladly refer to the valuable CONTINENTAL LEGAL HISTORY SERIES published under the auspices of the Association of American Law Schools, which goes some way towards disseminating knowledge of legal systems other than the Common Law.